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BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

MERCANTILE BANK LTD. v. J.P. PEREIRA

[C.A. (Wee Chong Jin C.J., Chua and Choor Singh JJ.) January 15, 1979]

[Singapore — Civil Appeal No. 67 of 1977]

Practice & Procedure — Action delayed — Action within limitation period — Action dismissed for want of prosecution — Appeal — Circumstances must be rare and exceptional for action to be dismissed for want of prosecution.

Limitation — Breach of contract — Action delayed but within 6 years' limitation period — Dismissal of action for want of prosecution — Circumstances must be rare and exceptional for action to be dismissed for want of prosecution.

The appellants employed the respondent in 1965. On July 31, 1971, they dismissed the respondent. The appellants issued a writ against him on February 11, 1976 for damages, *inter alia*, for breach of contract. The statement of claim was filed and delivered on September 10, 1976. In it, the appellants alleged that the cause of action against the respondent arose on June 29, 1971. On September 23, 1976 the appellant applied by way of summons-in-chambers to dismiss the action for want of prosecution. The respondent did not deny that the alleged cause of action arose on June 29, 1971 but claimed that the inordinate and inexcusable delay on the appellants' part in commencing the action and in serving the statement of claim on him would do grave injustice between the parties and would be prejudicial to a fair trial.

Although the limitation period was six years and the appellants could commence a fresh action within the limitation period if the action was dismissed for want of prosecution the Acting Registrar dismissed the action for want of prosecution. The appellants appealed. D'Cotta J. upheld the order of the Acting Registrar and dismissed the appeal notwithstanding the fact that the appellants had issued a fresh writ within the limitation period.

Held, allowing the appeal: in the present case no rare and exceptional circumstances exist for the action to be properly dismissed for want of prosecution.

Case referred to:-

(1) *Birkett* v. *James* [1977] 2 All E.R. 801.

CIVIL APPEAL.

M. Karthigesu (*P. Selvadurai* with him) for the appellants.

J. Grimberg (*K.R. Thampuran* with him) for the respondent.

Wee Chong Jin C.J. (delivering the judgment of the Court): The appellants, Mercantile Bank Limited employed the respondent, John Philip Pereira, in 1950. They dismissed him with effect from July 31, 1971 by which time he had risen to the post of Staff Officer in the bank. They commenced an action against him in the High Court. The writ was issued on February 11, 1976 and the claim as endorsed on the writ was for: —

(1) damages for breach of contract;

(2) damages for the defendant's breach of trust and confidence during his period of service in the plaintiffs' employment;

(3) damages for negligence and/or breach of duty statutory or otherwise in the performance of his obligations and duties during the period of his service in the plaintiffs' employment.

The statement of claim was filed and delivered on September 10, 1976. In it, the appellants alleged that the cause of action against the respondent arose on June 29, 1971. On September 23, 1976 the respondent applied by way of summons-in-chambers to dismiss the action for want of prosecution. The respondent in his affidavit in support of his application did not deny that the alleged cause of action arose on June 29, 1971 but claimed that the inordinate and inexcusable delay on the appellants' part in commencing the action and in serving the statement of claim on him would do grave injustice between the parties and would be prejudicial to a fair trial. In a later affidavit the respondent claimed that two material witnesses had died since the cause of action arose and their deaths have seriously prejudiced a fair trial.

Although it was not in dispute that the limitation period was six years and that the appellants could commence a fresh action within the limitation period if the action was dismissed for want of prosecution the Acting Registrar made an order dismissing the action for want of prosecution. The appellants appealed and D'Cotta J. upheld the order of the Acting Registrar and dismissed the appeal notwithstanding the fact that the appellants had issued a fresh writ within the limitation period.

At the conclusion of the appeal by the appellants against this order of D'Cotta J. we allowed the appeal. We now proceed to give our reasons.

In *Birkett* v. *James*[1] the House of Lords in England held (we quote from the headnote): —

"Held — If an action was dismissed for want of prosecution before the limitation period had expired, the court would have no power, in the absence of special circumstances, to prevent the plaintiff starting a fresh action within the limitation period and proceeding with it with all proper diligence. Accordingly, in cases where it appeared likely that, if the action were dismissed, the plaintiff would issue a fresh writ, the fact that the limitation period had not expired was, save in rare and exceptional cases, a conclusive reason for refusing to dismiss the action that was already pending on the ground that the

plaintiff had been guilty of inordinate and inexcusable delay in prosecuting the action."

Lord Diplock in his speech said (see p. 808): —

"For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending."

Lord Salmon in his speech said (see p. 813): —

"Quite apart however from the matters to which I have just referred the fact that this action was dismissed for want of prosecution at a time when the limitation period had not yet expired is, in my opinion, by itself a sufficient reason for allowing this appeal. No doubt the limitation period was fast running out by the time the judge in chambers gave judgment dismissing the action on March 30, 1976, but the plaintiff's solicitors had taken the wise precaution of issuing a fresh writ on March 27, and it was quite plain that they were likely to serve the fresh writ should the action be dismissed for want of prosecution; and this writ was before the Court of Appeal when they dismissed the appeal on October 22, 1976.

To dismiss the action in such circumstances would only add to the cost and cause further delay. So that it follows that there was nothing to be gained by dismissing the action for want of prosecution. In such cases it can seldom be proper to do so: see *Instrumatic Ltd.* v. *Supabrase Ltd., per* Lord Denning MR. I am not saying that it is impossible for an action to be properly dismissed for want of prosecution before the expiration of the limitation period but this can happen only in the most rare and exceptional circumstances — none of which exist in the present case."

Lord Edmund-Davies in his speech said (see p. 817-818): —

"Putting aside cases where the plaintiff has so misled the defendant that it might be wrong to allow him to sue afresh, I hold that a plaintiff is free to issue within the limitation period a further writ claiming the same relief and based on the same grounds as an earlier writ for want of prosecution, and it is irrelevant to the competency of the second action that by the time it comes on the defendant may well be even more prejudiced than he would have been had the first action been permitted to proceed to trial.

Such being the law as I understand it, I respectfully concur with my noble and learned friend, Lord Diplock, that, where there appears any likelihood that a plaintiff will issue a second writ, the case must be quite exceptional (and difficult to imagine) where the court should within the limitation period dismiss an action simply for want of prosecution. If it be complained that this places the defendant at the mercy of a dilatory plaintiff, a partial answer is that in a flagrant case the defendant can always seek peremptory orders which, if disobeyed, render the plaintiff liable to have his action struck out on the ground of contumelious default; though there, too, a second writ can properly be issued within the limitation period, unless the circumstances are such that it could on other grounds be regarded as frivolous or vexatious."

The facts in *Birkett* v. *James* are set out in the speech of Lord Diplock (see p. 810) as follows: —

"*The facts of the instant appeal.*

The history of the proceedings that form the subject-matter of the instant appeal may be stated very shortly. In them the plaintiff sues the defendant for £1,000,000 alleged to have become due on April 1, 1970 under oral agreements made at latest by December 3, 1969, of which there is no written evidence. The writ was not issued until July 25, 1972. It was served on the following day and thereafter the action proceeded with reasonable dispatch until June 28, 1973. On that day an order was made by Chapman J. for the trial of preliminary issues of fact as to whether or not the alleged oral agreements had been made. It required the action to be set down for trial within 28 days, i.e. by July 26, 1973. The plaintiff did not set down the action by that date; and in circumstances into which it is not necessary to enter for the purposes of the instant appeal, no further steps were taken by the plaintiff in the action for two years, until on July 23, 1975 notice of intention to proceed was given on the plaintiff's behalf by solicitors who had replaced those who were acting for him at the time of Chapman J's order of June 28, 1973. The defendant riposted by a summons to dismiss the action for want of prosecution served on October 2, 1975. This was about six months before the limitation period for the plaintiff's cause of action would expire."

Birkett v. *James* is of the highest persuasive authority and, relying on that authority, we were of the opinion that in the present case no rare and exceptional circumstances exist for the action to be properly dismissed for want of prosecution. Accordingly, we allowed the appeal.

Appeal allowed.

Solicitors: *Rodyk & Davidson; Wu & Raja.*

JOHN B. SKILLING & ORS. v. CONSOLIDATED HOTELS LTD.

[C.A. (Chua, Kulasekaram and D'Cotta JJ.) March, 6, 1979]

[Singapore — Civil Appeal No. 77 of 1978]

Engineers — Consultant engineers — Non-registration of — Claim for professional services rendered — Reliance on agreement between parties — Non-compliance with provisions of statute requiring registration — Agreement illegal and unenforceable — Professional Engineers' Act (Cap. 225), ss. 18 & 19

Conflict of Laws — Proper law of contract — Agreement providing for law of State of Washington to govern — Non-registration of engineers — Non-compliance with lex fori — Agreement illegal and void — Professional Engineers' Act (Cap. 225), ss. 18 & 19.

Contract — Contract tainted with illegality — Consultant engineers — Non-registration.

The appellants in this case sought to claim a sum of $143,358.28 from the respondents for professional services rendered to the respondents pursuant to an agreement between the parties dated August 19, 1971. The parties had agreed that the proper law of the said agreement was the law of the State of Washington. The lower court dismissed the claim on the ground that the said agreement was void and unenforceable.

The appellants were partners in a firm of consultant engineers practising in the United States. They were, however, not registered as required under sections 18 and 19 of the Professional Engineers' Act (Cap. 225).

Held, dismissing the appeal: (1) the said agreement was illegal as it infringed the provisions of section 18 and 19 of the Professional Engineers Act;

(2) a court will not enforce a contract which by its own *lex fori* it would not enforce because it was tainted with illegality. In this connection the foreign law factor is irrelevant.

[Editorial Note: See also *Raymond Banham & Anor.* v. *Consolidated Hotels, Ltd.* [1976] 1 M.L.J. 5 in which Choor Singh J. disallowed the plaintiffs/engineers' claim for professional services rendered on the ground of non-registration which infringed the provisions of the Professional Engineers' Act (Cap. 225).

COURT OF APPEAL.

Mahmood bin Mohammed Fadjiar for the appellants.

Steven Chan Swee Teck for the respondents.